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IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN SUPPORT OF PETITIONER

MARY PRICE
General Counsel
FAMM Fdtn., Suite 1400
1612 K Street, NW
Washington, DC 20006
(202) 822-6700

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorneys for Amicus Curiae

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QUESTION PRESENTED AND ADDRESSED BY AMICUS FAMM FOUNDATION

Should this Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), be formally overruled, in light of *Apprendi v. United States*, 530 U.S. 466 (2000), because any fact which may result in the imposition of an otherwise-inapplicable mandatory minimum penalty defines a different crime or "offence" under the Constitution?

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BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN SUPPORT OF PETITIONER

FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of petitioner William Harris. Both petitioner and respondent have granted consent to file this brief, and letters of consent have been filed with the Clerk of this Court.*

INTEREST OF AMICUS

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. Founded in 1991, FAMM has over 24,000 members in 35 Chapters nationwide. Most of our members are either serving mandatory minimum sentences or are family members of those prisoners. FAMM argues that mandatory minimum statutes, including 18 U.S.C. § 924(c) (as amended, 1988) as well as the commonly-prosecuted 21 U.S.C. § 841(b), are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function unwisely from the judiciary to the prosecution. To the extent that such statutes continue to exist, FAMM and its members have an urgent interest in seeing them applied only when the facts clearly warrant, including the right to grand jury indictment and jury verdict beyond a reasonable

* No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than FAMM and its membership, made any monetary contribution to its preparation or submission. See Rule 37.6.

doubt. FAMM does not contend that crime should go unpunished, but rather that the punishment should fit the crime.

SUMMARY OF ARGUMENT

The terms "crime," "offence" and "accusation," as employed in the Fifth and Sixth Amendments to the Constitution of the United States, must have some definite meaning if the rights associated with those constructs are not to be easily swept away by legislative evasion. Yet this Court has been caught in a dilemma for the past half century over the definition of these key constitutional terms. On one hand, the Court has held that the Constitution protects and preserves protections for criminal defendants, including proof beyond a reasonable doubt and trial by jury. See *Specht v. Patterson*, 386 U.S. 605 (1967); *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). On the other hand, the Court has held that the Constitution places few if any limits on the power of Congress and state legislatures to define criminal offenses, defenses, and sentences, including how those sentences are determined. See *Williams v. New York*, 337 U.S. 241 (1949); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). These two lines of authority serve core constitutional values, but each threatens to overwhelm the other. The *Winship-Mullaney* line challenges the constitutional values of federalism and legislative primacy. The *Williams-McMillan* line could reduce the Fifth and Fourteenth Amendment Due Process Clauses and the Sixth Amendment's notice and jury trial guarantees to dead letters. The latest case addressing this tension, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), sparked a dissent that characterized the opinion as based on a meaningless formalism and as a sharp departure from the Court's precedents. See *Apprendi*, 530 U.S. at 541

(O'Connor, J., dissenting). But the precedents that the dissenters invoked were marked by equally sharp and cogent dissents that later commanded a majority in *Apprendi*. See, *e.g.*, *McMillan*, 477 U.S. at 100-02 (Stevens, J., dissenting).

This brief explains why the core principle of *Apprendi* -- that facts which justify and authorize particular levels of punishment must be proved beyond a reasonable doubt to a jury -- applies not only where the legislature authorizes the sentencing court to exceed what would otherwise be the statutory maximum, but also where the court is prohibited from sentencing below a statutory minimum. Amicus FAMM accordingly urges this Court to reverse the judgment of the Fourth Circuit and remand this case for resentencing.

Despite the differences between the *Williams-McMillan* and the *Winship-Mullaney* lines of authority, they share a common approach to the constitutional definition of a criminal "offense." Sentencing, the province of judges, relies to some extent on predicate findings of guilt by the jury. The problem entails drawing the line between the functions of the jury and the functions of the judge. In its efforts to draw that line the Court has attempted to define the categories of facts for which the judge is responsible and those which a jury must find. Thus, in *McMillan* the Court held that a legislature could declare any fact a "sentencing factor" instead of an element, and assign it to the judge rather than the jury, provided only that the fact was not "a tail which wags the dog of the substantive offense." 477 U.S. at 88. In *Apprendi*, the Court struck down the New Jersey legislature's assignment to the judge, holding instead that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

This brief argues against these efforts to define categories of facts, and urges the Court to focus more directly on the constitutionally significant differences between the jury's function and that of the sentencing court. In any criminal case where trial by jury has not been waived, the jury determines wrongdoing and criminal fault, whereas the judge determines the applicable sentence.[1] In setting an appropriate sentence, the judge may also consider the offender's wrongdoing and fault, but does so for different purposes and subject to different legal and moral constraints. Once the two institutions' respective functions are carefully described with attention to these differences *McMillan* and its principal innovation -- the notion of a legislatively mandated "sentencing factor" -- are fatally undermined.

McMillan rests on an appealing but fallacious syllogism. The Court recognized in *Williams,* that a judge invested with sentencing discretion can base a sentence on any facts or none at all. 337 U.S. at 251-52. If a legislature designates discrete "sentencing factors" along with procedural requirements such as proof by a preponderance, then this might seem to be a gain for constitutional values, as compared with unfettered discretion. *McMillan* draws this conclusion, 477 U.S. at 91-92, but it does not follow. *McMillan* overlooks the significance of a legislature's enacting sentencing considerations into positive law. If some aspect of the offender's conduct is so salient to blameworthiness or fault that the legislature determines that it must result, if proven, in the imposition of a minimum sentence, then that fact ought to be litigated -- just as every other aspect of the wrongdoing is litigated -- before a jury, to a reasonable certainty.

[1] The *Apprendi* principle surely applies also to guilty pleas and bench trials, but exactly how it applies is not before the Court at this time.

The clarifications in terminology offered by this brief should help the Court to see the constitutional significance of a legislature's enacting sentencing considerations into positive law. *Mens rea*, for example, is one such salient aspect of the offender's wrongdoing. In *Apprendi*, all nine Members of this Court agreed, at least implicitly, that if racial animus were a *mens rea* instead of a motive, then that fact would have to be proved beyond a reasonable doubt to a jury. See *Apprendi*, 530 U.S. at 492 (opinion of the Court); accord, *id.* at 553 (O'Connor, J., dissenting).

The Constitution requires the conduct, circumstances, and results that comprise the offender's legislatively-defined wrongdoing to be proved to a jury beyond a reasonable doubt. The Constitution, as *Apprendi* teaches, also places *mens rea* in the jury's domain, because *mens rea* is indistinguishable from the rest of the wrongdoing. Indeed, *mens rea* is often what converts what might otherwise be merely undesirable behavior into criminal wrongdoing. The same points hold for fault considerations beyond *mens rea*. All the distinctive features of the offender's conduct that make it criminal and which, by statute, determine the severity of the wrongdoing, ought to be proved in the same manner and in the same proceeding as the rest of the offender's wrongdoing, without regard to the appellation "element" or "sentencing factor."

Finally, this brief will explain why these principles require the abolition of non-jury mandatory minimum sentencing as authorized by *McMillan* but do not require the abolition of determinate or guided-discretion sentencing generally.

ARGUMENT:
APPRENDI REQUIRES THAT *McMILLAN* BE OVERRULED.

1. The Essential Principle Underlying *Apprendi* Cannot Be Reconciled With the Holding of *McMillan*.

The decision of the Fourth Circuit below should be reversed. The holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was carefully stated to not prejudge the continuing viability of *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). *McMillan*, however, cannot survive. A correct application of the principles which informed *Apprendi* shows that its holding, requiring jury decisionmaking beyond a reasonable doubt, cannot tenably be limited only to those facts which may lead to an increase in the statutory maximum penalty that would otherwise apply. The constitutionally essential character of facts in both cases is the same: the legislature has determined that a certain finding leads to a conclusion of wrongdoing that in turn leads to a sentence range prescribed by the legislature. *Apprendi's* essential holding must now be extended to encompass all those facts designated by legislatures as requiring punishment.

The statute under which petitioner Harris was convicted and sentenced provides for a sequence of minimum sentences that vary on the basis of facts about how a firearm was used during and in furtherance of a drug transaction or violent crime.[2] The district court found that

[2] If the offender merely possessed a weapon, the minimum sentence is 5 years. If the offender brandished a weapon, the minimum sentence is 7 years. If the weapon was discharged, the minimum sentence is 10 years. Petitioner and amicus NACDL argue that the statute, which is silent with respect to the question of whether the jury or sentencing judge is to make this critical finding, is properly construed to require that the fact be found by the jury, as an element of a set of greater-inclusive offenses. FAMM does not disagree. See

Harris had brandished his weapon and sentenced him to serve seven years' imprisonment -- the minimum term provided by 18 U.S.C. § 924(c)(1)(A)(ii) (Supp. IV 1998). See *United States v. Harris*, 243 F.3d 806, 807 (2001).

As the Fourth Circuit held, the precise holding in *Apprendi v. New Jersey* does not prohibit this result. *Apprendi* requires a jury to decide facts that increase punishment only if the facts may be used to increase the sentence beyond a statutory maximum. 530 U.S. at 490. Section 924(c), as amended after *Bailey v. United States*, 516 U.S. 137 (1995), specifies no maximum sentence; by implication, the maximum in all cases may be life imprisonment. *See* 18 U.S.C. § 924(c). Harris thus could have been sentenced to serve seven years even in the absence of the mandatory minimum. *Harris*, 243 F.3d at 809. Accordingly, petitioner's case was governed below not by *Apprendi*, but by *McMillan*. *McMillan* held that a mandatory minimum sentence may be imposed upon facts determined by a judge instead of a jury. 477 U.S. at 87-88. If *McMillan* remains good law, then Harris's sentence is constitutionally unobjectionable. FAMM submit instead that petitioner's sentence should be overturned, *Apprendi* extended, and *McMillan* overruled to correct the deviation in course represented by the *McMillan* decision.

Apprendi represents the Court's most recent commitment to the principle that there is independent constitutional significance to the idea of a criminal "offence," so that constitutionally guaranteed trial rights cannot be eviscerated by clever legislative draftsmanship of the kind seen in section 924(c). This commitment was much in evidence in *In re Winship*, 397 U.S. 358 (1970), where the Court held that: "the Due Process Clause protects the accused against

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Castillo v. United States, 530 U.S. 120 (2000). This brief discusses the constitutional issue which arises if the statute is not so construed.

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. In response to the state's contention that Samuel Winship's offense was not a crime, but a matter of juvenile delinquency, the Court stressed that, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." *Id.* at 365.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court pointedly reiterated the principle that constitutional requirements cannot be evaded by mere changes in form:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, *characterizing them as factors that bear solely on the extent of punishment*.

Id. at 698 (emphasis added).

However, the Court has called this principle into question in a number of cases by permitting state legislatures and Congress wide latitude to define criminal offenses, defenses, and "sentencing factors." For example, *Mullaney* required the prosecution to disprove a claim of provocation -- relevant to the traditional line between murder and manslaughter -- beyond a reasonable doubt. Subsequently, the Court deprived *Mullaney* of much of its significance by concluding in *Patterson v. New York*, 432 U.S. 197 (1977), that:

> The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which

> otherwise is within its constitutional powers to sanction by substantial punishment.

Id. at 207-08.[3] Likewise, in *McMillan*, the Court not only authorized state legislatures to convert offense elements into "sentencing factors" with very little constitutional constraint, it went on to emphasize the point by asserting: "We reject the view that anything in the Due Process Clause bars States from making changes in their criminal laws that have the effect of making it easier for the prosecution to obtain convictions." 477 U.S. at 90 n.5.[4]

In *Apprendi* this Court returned to the *Winship-Mullaney* line of cases, and took its most important step to date in enunciating the constitutional definition of a criminal "offence." Offering a standard intended to protect

[3] Whereas *Mullaney* required the prosecution to disprove common-law "heat of passion" or provocation beyond a reasonable doubt, the Court held in *Patterson* that the defendant could be required to prove the constitutionally indistinguishable Model Penal Code defense of "extreme emotional disturbance" by a preponderance. The Court decided that the real defect in *Mullaney*, not present in *Patterson*, was that Maine had shifted to the defenant the burden on an acknowledged element of murder. As the *Patterson* dissenters pointed out, this exercise in labeling was precisely the sort of formalism that *Winship* and *Mullaney* had rejected in their due process analyses. *Id.* at 224-25 (Powell, J., dissenting). Furthermore, *Patterson* was not distinguishable from *Mullaney* on this ground because, as Justice Powell pointed out in his *Patterson* dissent, *id.* at 222 n.4, and as the *Mullaney* court explicitly recognized, 421 U.S. at 689, the Maine court had declared as a matter of state law that "malice aforethought" was not an element of murder, but only a policy presumption underlying its homicide law. Thus, the elements of the offense and defense in Maine were essentially the same as those in New York.

[4] Presumably, the Court took the same view of the Sixth Amendment, given that the convictions at issue in *McMillan* had been challenged on this ground as well.

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constitutional trial rights from legislative erosion, *Apprendi* holds that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The facts of *Apprendi* did not call for a broader rule. However, the facts of the instant case do, and the Court should not hesitate to declare it. The Court should strengthen *Apprendi*'s rule by extending it to mandatory minimum sentences.

Justice O'Connor's dissent focused on the critical weakness of the *Apprendi* analysis: The legislature need only manipulate the statutory maximum or eliminate it altogether and then use "sentencing factors" to mitigate punishments downward to evade *Apprendi's* holding. 530 U.S. at 540-41 (O'Connor, J., dissenting). In his opinion for the Court, Justice Stevens replied to this argument as he had 15 years earlier in his *McMillan* dissent, suggesting that political constraints will forestall legislatures from increasing statutory maxima to draconian levels across the board. 530 U.S. at n.16; see also *McMillan*, 477 U.S. at 100-02 (Stevens, J., dissenting). Regretably, this prediction has not been borne out, as legislatures have passed laws that authorize or even mandate severe sentences out of all rational proportion to either desert or societal benefit. *See* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 Hastings L.J. 829 (2000) (describing and analyzing draconian punishments imposed in the anti-crime hysteria of the 1980s and 1990s).

For example, the changes made in 1998 to the statute involved in petitioner's case, 18 U.S.C. § 924(c)(1)(A), that eliminated maximum sentences, were effected without political opposition. Congress showed that it can simply eliminate statutory maxima from statutes, and pass new statutes without maximum limits, not merely in theory but in

fact. Congress thus effectively set the maximum sentence for all § 924(c) offenses at life imprisonment, without regard to any moral proportionality between worst-cases -- the traditional function of a statutory maximum. Whatever limits *Apprendi* currently imposes are thus eviscerated.

There is another reason to doubt that political constraints will forestall the erosion of *Apprendi*. The statutory maxima on which the *Apprendi* analysis turns are historical relics -- artifacts of indeterminate sentencing practices now largely abandoned.[5] With the advent of determinate sentences and sentencing guidelines in the 1980s, these statutory maxima now serve little purpose. Parole boards have been abolished and sentencing courts must observe the constraints of sentencing grids in the first instance, with little or no reference to statutory maxima. As Section 924(c)(1)(A) demonstrates, a determinate, guidelines-based sentencing scheme appears to eliminate any need for the traditional maximum sentence. Justice O'Connor's *reductio ad absurdum* of *Apprendi*'s analysis will

[5] As the Court's opinion in the 1949 *Williams* case confidently asserts, penal theory and policy in that era was oriented toward rehabilitation. *Williams v. New York*, 337 U.S. 241 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."). The law and institutions of punishment reflected this philosophy: judges set high, indeterminate sentences so that prison and parole officials would have latitude in setting rehabilitative goals and in determining when the offender had met those goals. *See* Marvin Frankel, Criminal Sentences (1974); Alan Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U.Pa.L.Rev 297, 298 (1974). The statutory maxima that traditionally appear in the definitional sections of criminal offenses or in accompanying offense classification statutes are relics of this system: they are the wide upper limits of sentences that judges were to set with a view toward an earlier termination by a parole board.

be fully vindicated by the actual facts, as Congress and state legislatures do away with establishing maximum sentences.

These arguments favor extending *Apprendi*, not abandoning it. *Apprendi* has carried forward the *Winship-Mullaney* standard to define what process is due when legislatures attach penal consequences to facts about wrongdoing. It is true, as Justice O'Connor pointed out, that *Apprendi* is subject to a *reductio ad absurdum*, but so is the competing rule of *McMillan*. Concurring in *Apprendi*, Justice Scalia suggested this competing *reductio* when he wrote:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee ... the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

530 U.S. at 498-99 (Scalia, J., concurring). This is the same danger about which the *Mullaney* court warned when it discussed the lack of constitutional constraints on drafting to convert offense elements into sentencing factors. 421 U.S. at 698. The danger is especially great in the case of mandatory minimum sentences. *McMillan's* "tail which wags the dog" standard cannot suffice. It is not only vague, but it also fails to reflect any principle derived from that case's holding or analysis. To protect the substance of the Sixth Amendment guarantee of trial by jury, the holding of *Apprendi* must be extended to overrule the flawed decision in *McMillan*.

2. *Apprendi's* Terminology Should Be Clarified.

In his *Apprendi* concurrence, Justice Thomas advocated overruling *McMillan* and adopting a rule for the constitutional definition of a criminal offense that is

not constrained by reference to statutory maxima. 530 U.S. at 520-22 (Thomas, J., concurring). In Justice Thomas's formulation, "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast to a fact that mitigates punishment)." *Id.* at 501. Unfortunately, this formulation is vulnerable to the same *reductio ad absurdum* that the *Apprendi* dissenters leveled against Justice Stevens's majority opinion. Almost any aggravating fact for which proof to a jury beyond a reasonable doubt might be required can be committed to the sentencing judge instead by rephrasing that fact as a mitigator of a harsher general maximum. The "imposing or increasing" formulation offers no greater protection against legislative evasion than does the Court's.

The focus should not be on aggravation or mitigation, but instead on the concept that lies behind them: criminal fault. "Criminal fault" refers to those aspects of the offender's wrongdoing which make the conduct blameworthy and which determine the applicable punishment. Because the Constitution guarantees the proof of criminal wrongdoing beyond a reasonable doubt to a jury, it guarantees that each aspect of criminal fault must be proven beyond a reasonable doubt to the jury, regardless of how it may be legislatively labeled.

While aggravating factors can generally be rephrased as mitigating factors, the converse is not true. For example, mental deficiency or disease not amounting to legal insanity is a common ground for mitigating punishment.[6] But there is no meaningful

[6] It appears as a statutory mitigator in most if not all capital punishment schemes. *See, e.g.*, Cal. Penal Code § 190.3(h); Colo. Rev. Stat. §§ 16-11-103(4)(b); N.Y. Crim. Pro. Law §§ 400.27(9)(b); N.C. Gen. Stat. § 15A-2000(f)(6). Mental disease or defect is listed

aggravating converse of this mitigator. Ordinary intelligence or mental health is never viewed as an aggravating factor in sentencing. The term "mitigation", then, sometimes refers to a consideration that has an aggravating converse, but sometimes it does not.[7]

In its attempt to distinguish between offense elements and sentencing factors for constitutional purposes, then, the Court would do well to avoid the terms "aggravation" and "mitigation," and focus on the

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in the original menu of mitigating factors in the Model Penal Code's capital sentencing provision. Model Penal Code § 210.6(4)(g), at 124 (ALI 1985). The draft version of section 210.6 served as the model for most states' redrafting of their capital sentencing statutes following the decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

[7] This ambiguity plays a role in the *Apprendi* opinion, and might account for some of the Court's misplaced confidence in the aggravation/ mitigation distinction. One of Justice Stevens's responses to Justice O'Connor's *reductio* is the argument that "the principal dissent ignores the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation." 530 U.S. 490 n.16. Yet the ease of conversion from aggravation to mitigation is one of the reasons that Justice O'Connor's argument works. The majority countered with an example that does not have an aggravating converse:

> If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.

Id. Because no judge or legislature would increase punishment on the ground that the offender never has served in the military, a statute that treated veteran status as a sentencing factor would not be vulnerable to Justice O'Connor's argument. That does not show, however, that the argument is generally invalid.

concept of "fault" instead.[8] Fault is an essential aspect of criminal wrongdoing.[9] Two points about fault will demonstrate why it is the superior focal point. First, the most common term associated with criminal fault is "*mens rea,*" but this term is too limiting. *Mens rea* denotes a mental state, while fault is not limited to mental states. Wayne R. LaFave, Criminal Law 224-25 (3d ed. 2000). Negligence, for example, is by definition a style of conduct, not a mental state, but it is a well recognized form of criminal fault. Other examples of objective or non-intentional fault pervading the criminal law include felony murder, transferred intent, intoxication, accomplice liability, unreasonable mistake, and strict liability. In each, fault is to be found, not in a discrete mental state but in a broader set of facts surrounding the offense.[10]

[8] In the matter of a constitutional definition of a criminal offense, the sense of "culpability" or "mitigation" pertaining to eligibility for punishment is not in issue. Sentencing factors are used both to increase and to decrease punishment, which tells us that fault is at issue.

[9] The nature of criminal fault has been the subject of intense scholarly interest in recent years. Much of this work illuminates the nature of objective or non-intentional fault and its relationship to criminal wrongdoing. *See* Kyron Huigens, *Virtue and Inculpation*, 108 Harv.L.Rev. 1423 (1995); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 Wm. & Mary L. Rev. 943 (2000); Dan M. Kahan, *Ignorance of -Law Is an Excuse -- But Only for the Virtuous*, 96 Mich. L. Rev. 127 (1997); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269 (1996); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463 (1992); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 U.S.C. L. Rev. 953 (1998).

[10] *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo.L.J. 387, 420-23 (2002). For example, strict liability usually is defined as

This Court has recognized the existence of criminal fault beyond *mens rea* on several occasions, notably in *Egelhoff v. Montana*, 518 U.S. 32 (1996). There, the Court held that a state does not violate due process if it prohibits proof of intoxication to negate the mental states of purpose or knowledge in defense of a murder charge. The conviction for murder can, constitutionally, rest on non-intentional fault inferred from the manner and circumstances of the killing, including the defendant's intoxication. See also *Tison v. Arizona*, 481 U.S. 137, 157 (1987).

Second, positive fault considerations should be distinguished from interstitial fault considerations. *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo.L.J. 387, 433 (2002). Positive fault considerations are those so closely related to the wrongdoing that the legislature has mandated their consideration in positive law. Matters such as depraved indifference to human life or

_____(cont'd)
criminal liability without culpability or as criminal liability without proof of a mental state, see, *e.g.*, *United States v. Cordoba-Hincapie*, 825 F.Supp. 485 (E.D.N.Y. 1993) (Weinstein, J.) (invoking both of these definitions), and usually is said to be unjust for precisely these reasons. *See, e.g.*, 1 Model Penal Code and Commentaries, pt. I, § 2.05, cmt. 1, at 283 (ALI 1985). But as the foregoing examples indicate, we impose criminal liability without proof of a mental state in many situations. And in most cases of strict liability, one can identify some fault, usually negligence, somewhere in the transaction. Mark Kelman, *Strict Liability: An Unorthodox View, in* Encyclopedia of Crime and Justice 1512, 1516-17 (1983); Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J.Crim.L. & Crimin. 1075, 1121-22 (1997). The reason that strict liability is unjust is that the prosecution is relieved of the task of proving fault explicitly, while the defendant simultaneously is deprived of any formal avenue of rebutting the inference that he was at fault. In other words, strict liability is objectionable because it violates due process or the principle of legality, not because it is criminal liability without fault.

a purpose to kill are statutory elements of an offense. Interstitial fault considerations bear on the gravity or severity of the wrongdoing, but have not been enacted into positive law, having not been deemed necessary distinguishing features of a type or degree of wrongdoing that the legislature has condemned.

For example, both mercy killings and contract killings are deemed murder, as defined in most if not all jurisdictions, because both exhibit the positive (legal) fault consideration of purpose or premeditation. Yet vastly different circumstances surround the two killings: acceding to the request of a loved one who is in intolerable pain versus making a profit from the cold-hearted killing of a stranger. These surrounding circumstances -- although they generally make an enormous difference in how we evaluate the murders -- are interstitial fault considerations, unless the legislature has, for example, created a separate "mercy killing" category. Even when not enacted by the legislature into law such considerations would bear heavily on how any reasonable judge would approach penalizing the murders. Nevertheless, because taking them into account is not mandated, they are not positive fault considerations. On the other hand, whatever fault considerations are enacted into positive law to control the available range of sentences are subject to the constitutional rule of *Apprendi*.

3. *McMillan* Should Be Formally Overruled.

Clarifying the terminology of culpability and fault in these ways permits one to see why *McMillan* was incorrectly decided. *McMillan* upheld a Pennsylvania statute that imposed a mandatory minimum sentence based on a finding by the trial court that the offender had "visibly possessed a firearm" during the commission

of the offense. 477 U.S. at 80-81 (*citing* 42 Pa.Cons. Stat. § 9712 (1982)).[11] The Court held that the Constitution does not require this finding to be made by a jury. The *McMillan* majority's conclusion, however, was mistaken. To possess a firearm visibly while committing an offense is not merely an aggravating factor under the Pennsylvania statute; it is a matter of positive fault, because the legislature mandated an alteration of the penalty on that particular basis. This precludes, as a constitutional matter, our removing it from the jury's province.

All the members of this Court expressed concern in *Apprendi* about whether a legislative could define as a "motive" and thus as a "sentencing factor" a defendant's state of mind which is within the traditional scope of *mens rea*. This is reflected in the discussion about whether a racial "purpose" could be characterized as a motive instead of a *mens rea*. See *Apprendi*, 530 U.S. at 492 (opinion of the Court); *id.* at 553 (O'Connor, J., dissenting). All the Members of this Court agreed, implicitly, that if a racial purpose were truly a *mens rea*, then it could not be converted into a sentencing factor consistent with due process and the jury trial guarantee. But criminal fault is not confined to mental states. The reasons that lead us consistently to treat mental-state indicators of fault as a necessary part of the offense definition should lead us to treat

[11] The "factor" at issue in *McMillan* was thus akin to, but not the same as, any of the aggravating considerations in 18 U.S.C. § 924(c)(1)(A) at issue here. "Visibly possessing" a firearm, that is "displaying" it or otherwise making its presence apparent, would appear to fall somewhere between a non-aggravated § 924(c) offense, and Harris's alleged offense of "brandishing," which is the first level of aggravation under the federal statute.

objective or non-intentional fault in the same way.[12]

Consequently, *McMillan* was incorrectly decided. Just as *mens rea* cannot be removed from an offense definition without violating the Fifth, Sixth, and Fourteenth Amendments, so other objective or non-intentional fault considerations are subject to the same constraint. The Constitution, properly understood, demands that if Pennsylvania thinks display of a firearm during the commission of an offense indicates a punishable degree of fault that is not reflected in existing law, then Pennsylvania must include visible possession of a firearm in the definition of a new offense or a new degree of an existing offense. So Congress, in amending 18 U.S.C. § 924(c)(1)(A), violated the Constitution if it did not require that "brandishing" a firearm, during and in relation to a crime of violence or drug trafficking offense, be a fact that must be charged in the indictment and proved at trial beyond a reasonable doubt, to be determined by the jury.

This analysis informs a response to the argument at the heart of the majority opinion in *McMillan*. In *Williams v. New York*, 337 U.S. 241 (1949), the defendant had objected, *inter alia*, to the use of uncharged and unproved crimes in his capital sentencing. In rejecting this challenge, the Court reasoned that the trial judge had discretion in the sentencing, and that "no federal constitutional objection would have been possible if the judge had sentenced appellant to death because appellant's trial manner impressed the judge that the appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all." *Id.* at 252.

[12] These reasons are more fully explored in Huigens, 90 Geo. L.J. at 442-53.

This being the case, there could be no constitutional objection to a procedure that made the grounds of Williams' sentence explicit. *Id.* The *McMillan* opinion adopted this line of reasoning:

> Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof. We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing. Petitioners apparently concede that Pennsylvania's scheme would pass constitutional muster if only it did not remove the sentencing court's discretion, i.e., if the legislature had simply directed the court to consider visible possession in passing sentence. We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.

Id. at 91-92 (citing *Williams*).[13]

The *Williams-McMillan* syllogism is flawed because it ignores the significance of a legislature's decision to enact a particular fault consideration into positive law. Simply because the jury and the judge consider different kinds of

[13] The Court also reasoned:

> The Pennsylvania Legislature did not change the definition of any offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment -- the instrumentality used in committing a violent felony -- and dictated the precise weight to be given that factor if the instrumentality is a firearm.

Id. at 89-90.

fault for different purposes at different phases of the process, it does not follow that the sentencing court can lawfully determine positive fault. Under the Constitution, that power belongs exclusively to the jury. The fact that the legislature has mandated the facts' consideration means that they are inseparable from the wrongdoing in the same way that *mens rea* is indistinguishable from the wrongdoing; they are the circumstances that make the offender's conduct criminal instead of merely undesirable, and which -- the legislature has thus decided -- justify the offender's punishment as a threshold matter.

By rendering its verdict, the jury determines whether any punishment is justified, and in doing so the jury necessarily determines whether the offender is at fault. This fault determination generally turns on an intentional state, and sometimes also on a broader set of facts concerning the manner and circumstances of the wrongdoing. In either event, the jury decides the question of fault because it establishes the justification for punishment. By mandating the adjudication of a particular aspect of the wrongdoing, and assigning it a penalty, the legislature has ensured that the wrongdoing in question will be clearly condemned. The creation of a positive fault provision means this aspect of the wrongdoing is essential to the criminal prohibition and to the justification for punishment. The enactment of a particular fault consideration into positive law is conclusive evidence that it pertains to the jury's function.

In contrast, fault determinations constitutionally made by a sentencing court concern interstitial fault. Its task is to determine the appropriate punishment within legislative bounds. The offender's wrongdoing as determined by the verdict, including his positive fault, is obviously pertinent to this task, but the task of sentencing involves a far broader set of concerns than the jury considers. The number and gradation of facts that might

bear on fault is virtually infinite, and not all of them need be or can be positively enacted into statutory law. These include not only the various ends of punishment, *see* 18 U.S.C. § 3553(a)(2), but also matters more closely concerned with the individual offender, such as his personal capacities and characteristics, the impact of a sentence on his dependents and other third parties, and the possibility of mercy. Among its wide-ranging concerns, the sentencing court addresses interstitial fault.

In setting a sentence, the court goes beyond the jury's delimited determination of wrongdoing and positive fault and considers the manner and circumstances of the particular offense, and the more subtle signs and gradations of fault, as found in the interstices of the positive law. While a legislature must mandate consideration of certain aspects of the wrongdoing in order to define the offense at all, it is not necessary to mandate judicial consideration of particular aspects of the wrongdoing in sentencing. Indeed, as the Court's experience in the constitutional regulation of capital sentencing shows, to do so is likely to have unintended and undesirable consequences.[14]

The distinction between positive and interstitial fault considerations breaks the *Williams-McMillan* syllogism and helps to explain why the Pennsylvania firearm enhancement violated the Constitution -- and thus why the mandatory minimum provisions of 18 U.S.C. § 924(c)(1)(A) are likewise unconstitutional, if not construed as defining

[14] In the constitutional regulation of capital punishment, the Court initially demanded a rule-like approach to death sentencing, with the objective of reducing inequality and arbitrariness. See *Furman v. Georgia*, 408 U.S. 238, 242 (1972); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Subsequently, when faced with some egregious cases of over-inclusion, the Court demanded the individualized consideration of desert in death sentencing. See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Lockett v. Ohio*, 438 U.S. 586 (1977).

elements of related, graded offenses. The Pennsylvania legislature required trial courts to take the visible possession of a firearm into account in the punishment of certain offenses. In doing so, the legislature expressed its determination that this aspect of the wrongdoing was essential to those prohibitions; that the wrongdoing ought to be particularly condemned in this regard; that others ought to be deterred from acting in this particular way; that the offender's blameworthiness was particularly tied to this point; that, in short, this aspect of the offender's wrongdoing necessarily warranted his punishment. This aspect of the wrongdoing was thus placed in the same functional role as a *mens rea* element. It defined the conduct in question as criminal and not merely undesirable, and was deemed by the legislature to be an indispensable consideration in the question of whether the individual's relationship to society ought to undergo the fundamental transformation that a criminal conviction represents. The legislature should have required such a matter to be pled and proved in the same manner as an essential element of an offense because it *was*, as a constitutional matter, an essential element of an "offence" or "crime," as those terms are used in the Fifth and Sixth Amendments.

The fact that the sentencing court could have considered the visible possession of a firearm in sentencing, even if the legislature had not mandated its consideration, is simply irrelevant. In that event, the display of a firearm would have been among the countless features of the offense that might have been singled out by the legislature, but were not. The details of the firearm's use or possession would then have been interstitial fault considerations, because the legislature did not consider them on a par with the offense elements. Visible possession would have been one of many considerations the sentencing court could take into account in determining punishment -- which, as the Court has said, is

a question that can be decided under different constitutional procedures than the threshold question of guilt or innocence. See *Williams*, 337 U.S. at 252; *accord*, USSG § 6A1.3 (p.s.), and commentary. *McMillan* was wrongly decided, because it failed to guarantee necessary constitutional procedural protections to defendants whose offenses included features so essential to the wrongdoing that the legislature singled them out for punishment.

4. The Mandatory Minimum Sentence Imposed in the Instant Case Should Be Reversed.

For the reasons discussed in this brief, the mandatory minimum sentencing provisions of the statute under which petitioner Harris was convicted and sentenced, 18 U.S.C. § 924(c)(1)(A)(ii) (Supp. IV 1998), are unconstitutional, if not construed as defining separate, aggravated offenses, because they violate Due Process and the Sixth Amendment jury trial guarantee.

The Fourth Circuit, being bound to do so, followed the fallacious reasoning of *McMillan*. Invoking *Williams v. New York*, the court below wrote:

> Because, like the statute at issue in *McMillan*, § 924(c)(1)(A) contains no maximum penalty[15], the government's failure to charge and prove brandishing beyond a reasonable doubt did not expose Harris to a punishment greater than he could have received had the sentencing judge not found that Harris "brandished" a firearm. Even without the "brandishing" finding, Harris could have received a seven-year sentence. In fact, the sentencing judge noted that if we reversed this brandishing ruling, he might nonetheless exercise his discretion and apply a seven-year prison term upon resentencing.

243 F.3d at 808-09.

It is true that, absent the mandatory minimum provision, the sentencing court could have given Harris a seven-year sentence. Far more significant, however, is that in the absence of the mandatory minimum provision the sentencing court could have given Harris less than a seven-year sentence, could have declined to take the brandishing into account, or could have considered Harris's use of a weapon, if at all, in terms other than "brandishing."[16] Were the consequences of a finding of the factor not mandatory, then the particulars of Harris's use of the weapon would have been interstitial fault considerations that the sentencing court might have weighed in the balance with a virtually unlimited number of other considerations.

As matters stand, however, Congress has mandated consideration of whether Harris brandished a weapon and has assigned a particular penal consequence to that finding. Regardless of the statutory form this mandate takes, the fact that it exists makes "brandishing" a positive fault consideration. As such, it implicates not the judge's concern for an appropriate sentence, but rather the jury's to find the violation *vel non* of a particular criminal prohibition that justifies punishment.

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[15] In fact, the Pennsylvania statute at issue in *McMillan* did "contain," that is, specify, a definite maximum sentence. That maximum was not altered by the facts which triggered application of the mandatory minimum, however.

[16] The files of amicus FAMM are filled with transcripts of sentencings and letters from sentencing judges expressing deep remorse, frustration and regret over having to impose mandatory minimum terms which are objectively unreasonable and inapt in particular cases. *See, e.g.*, FAMMgram, vol. 11, no. 3, at 15 (Fall 2001); other statements are posted at http//www.famm.org.

Because brandishing must be considered under this law, and is not simply one of the unlimited number of factors which "a court of the United States may receive and consider for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3661,[17] brandishing is essential to the offense the legislature has created. It is thus indistinguishable, for constitutional purposes, from a *mens rea* element of the offense. Like *mens rea*, this objective feature of the offense ought to have been charged in a grand jury indictment and proved beyond a reasonable doubt to a jury. Because this essential element was determined instead by the judge, petitioner Harris was improperly sentenced for an offense that was neither charged nor proved. To the extent that Congress intended the statute to create minimum-mandating "sentencing factors," section 924(c)(1) is *pro tanto* unconstitutional. Accordingly, the decision of the Fourth Circuit should be reversed and petitioner's case remanded to the district court for resentencing.

5. Overruling *McMillan* Will Be Minimally Disruptive to Most Contemporary Guideline Sentencing Systems.

The Court might legitimately be concerned about the practical impact of overruling *McMillan* on the foregoing grounds. It might be thought that invalidating uncharged, judge-determined mandatory minimum sentencing would necessarily render unconstitutional all relatively determinate sentencing systems, including that conducted under the Federal Sentencing Guidelines. This is not the case. Nothing in the foregoing analysis would prevent Congress or a state legislature from addressing the issues of discrepancy, inequality, and "truth-in-sentencing" with a guided-discretion sentencing system.

[17] *See also* 21 U.S.C. § 850 (same allowance for sentencing in controlled substance cases).

The contemporary guided-discretion sentencing systems in the states generally involve sentencing grids that suggest a sentence within a relatively narrow range at the intersection of an offense grade and a criminal history score. *See, e.g.*, Rev. Code. Wash. § 9.94A.310 (2001). The specific sentence is determined by a sentencing judge exercising her discretion. *See, e.g.*, Rev. Code Wash. § 9.94A.210(1)(a)(ii) (2001). Such schemes also grant the judge discretion to depart from the prescribed range, and the grounds for departure are not themselves prescribed by guidelines. Instead, they are fully discretionary, although the legislature often provides a list of non-binding sentencing factors for consideration in individual cases. *See, e.g.*, Rev. Code Wash. § 9.94A.390 (2001). Unlike sentences in the *Williams*-type, fully discretionary sentencing systems, see *Dorszynski v. United States*, 418 U.S. 424 (1974), these departures from the sentencing grid are subject to appellate review. *See, e.g.*, Rev. Code Wash. § 9.94A.210(2) (2001). In these systems parole as such is unavailable, and the offender must serve a specified, often large, percentage of the term imposed. See, *e.g.*, Rev. Code Wash. § 9.94A.150 (2001).

None of these state determinate sentencing systems violates the Constitution under the principles described in this brief. The baseline sentencing range is determined by the offense of conviction, all the essential elements of which presumably have been properly charged and proved beyond a reasonable doubt to a jury. The next two stages of sentencing in these systems -- specifying a sentence within the range or departing from the range -- are discretionary. At no point has the legislature done what is impermissible under the analysis presented in this brief, which is to *mandate* the consideration of a particular fault element in sentencing.

The guidelines system adopted under the federal Sentencing Reform Act differs from state determinate or

guided-discretion sentencing schemes in several ways. Yet the United States Sentencing Guidelines themselves do not violate the Constitution under the principles laid out in this brief. Critical to the analysis here, the lower courts have interpreted the Act -- in particular, 18 U.S.C. § 3553(b)[18] -- as mandating a sentence within the properly computed guideline range. That range is based on specified factors that are litigated in the course of sentencing, unless specific findings are made to justify a departure. A less rigid, but perfectly plausible, construction of the Act would readily cure any potential constitutional defect resulting from an interpretation that gives the sentencing judge not only authority but actually the obligation to determine positive fault considerations. Wider acceptance and better understanding of the flexible approach to guideline departures under § 3553(b) elaborated by this Court in *Koon v. United States*, 518 U.S. 81 (1996), but still all too often resisted by the lower courts, would likewise ensure a constitutional application of the guidelines as encouraging a rational approach to interstitial fault considerations, without a usurpation of jury authority.

As the guidelines were originally designed, the district courts were to exercise a substantial degree of discretion comparable to that exercised by judges in state determinate sentencing schemes. Subsequent developments in the evolution of guidelines jurisprudence have obscured this feature of the system, notably an overly strict interpretation of the term "shall" in § 3553(b) -- but these alterations are

[18] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [*i.e.*, that prescribed by the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

by no means beyond correction. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 Notre Dame L. Rev. 21 (2000). To avoid a constitutional problem (see *United States v. Lopez*, 514 U.S. 549, 562 (1995); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)), the Act could be given its more natural reading -- with the guidelines treated under § 3553(a) as one factor among many to be considered by the court, and section 3553(b) understood as giving the general standards and criteria for departures. For these reasons, a holding that *Apprendi* overrules *McMillan* would not threaten the federal sentencing guidelines.

CONCLUSION

For the foregoing reasons,[**] FAMM urges this Court to overrule the decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). The Court should reverse the judgment of the United States Court of Appeals for the Fourth Circuit

[**] FAMM wishes to express its appreciation to Professor Kyron Huigens for his generous assistance in the preparation of this Brief. The views expressed herein are those of FAMM, however, and not necessarily identical with Prof. Huigens'.

and remand the case with directions to allow petitioner a resentencing.

Respectfully submitted,

MARY PRICE
General Counsel
FAMM Fdtn., Suite 1400
1612 K Street, NW
Washington, DC 20006

(202) 822-6700

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Attorneys for Amicus Curiae

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